

CITY OF TIGARD, OREGON

ORDINANCE NO. 04-08

AN ORDINANCE AUTHORIZING THE TRANSFER OF THE FRANCHISE AGREEMENT BETWEEN THE CITY OF TIGARD AND PORTLAND GENERAL DISTRIBUTION LLC TO ONFIBER COMMUNICATIONS, INC., AUTHORIZING THE MAYOR TO SIGN A REVISED AGREEMENT, AND DECLARING AN EMERGENCY.

WHEREAS, the City of Tigard granted a non-exclusive, ten-year telecommunications franchise to Portland General Distribution LLC by Ordinance No. 00-29 on October 24, 2000, and

WHEREAS, Portland General Distribution LLC, doing business as Portland General Broadband, laid telecommunications fiber in several rights-of-way within the City of Tigard, and

WHEREAS, Portland General Distribution LLC has stopped providing telecommunications services and plans to sell its facilities to OnFiber Communications, Inc., and

WHEREAS, the franchise between the City of Tigard and Portland General Distribution LLC, requires City approval for the transfer of the franchise to a new company, and

WHEREAS, Portland General Distribution LLC and OnFiber Communications, Inc. have requested the transfer of the franchise from Portland General Distribution LLC to OnFiber Communications, Inc., and

WHEREAS, OnFiber Communications, Inc. has provided written confirmation of its agreement to be bound by all terms, conditions, and obligations of the City of Tigard franchise granted to Portland General Distribution LLC, and

WHEREAS, the projected sale of Portland General Distribution LLC assets to OnFiber Communications, Inc. is projected to close in early September 2004.

NOW, THEREFORE, THE CITY OF TIGARD ORDAINS AS FOLLOWS:

SECTION 1: The City of Tigard agrees and grants its consent to the transfer of the telecommunications franchise between the City and Portland General Distribution LLC to OnFiber Communications, Inc.


SECTION 2: The franchise agreement between the City of Tigard and Portland General Distribution LLC shall be revised as shown in Exhibit A to this ordinance to substitute OnFiber Communications, Inc. for Portland General Distribution LLC

SECTION 3: The Mayor is hereby authorized to sign the revised agreement on behalf of the City of Tigard.


SECTION 4: The transferred franchise shall retain its original expiration date of November 24, 2010.

SECTION 5: Timing is of the essence due to the projected closure date of the sale of Portland General Distribution LLC assets to OnFiber Communications, Inc. Therefore an emergency is declared to exist and this ordinance shall take effect upon receipt of the signed revised franchise agreement from OnFiber Communications, Inc.

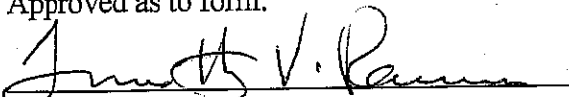
PASSED: By 4 Affirmative. with one Abstention (Councilor Moore) votes of all Council members present after being read by number and title only, this 10th day of August, 2004.


Jane McGarvin, Deputy City Recorder

APPROVED: By Tigard City Council this 10th day of August, 2004.


Craig Dirksen, Mayor

Approved as to form:


City Attorney

8.10.04
Date

EXHIBIT "A"

TRANSFERRED FROM PORTLAND GENERAL DISTRIBUTION LLC

A franchise agreement between the City of Tigard and OnFiber Communications, Inc.

SECTION 1. Subject to the other terms and conditions set forth in this document there is hereby granted by the City of Tigard to OnFiber Communications, Inc., (herein referred to as "Grantee"); its successors and assigns; subject to the development ordinances and regulations of the City, the right and privilege to conduct a telecommunications business within said City, or such other public property as may come within the jurisdiction of the City during the term of this agreement for the purpose of furnishing telecommunications services as defined in State and Federal Law. This grant includes the right to erect, construct, place, replace, reconstruct, lay, maintain, and operate poles, wires, switching equipment, amplifying equipment, fixtures, facilities, appliances, structures and other devices including, but not limited to, electronic, optical, and mechanical devices customarily associated with Grantee's function in public rights-of-way and in public property for the purpose of serving as a telecommunications utility.

This franchise is granted solely for the privilege of providing telecommunications services as defined by State and Federal Law. This franchise does not include the right to conduct the business of providing a "cable system" as defined in applicable law. Should the Grantee desire to provide a cable system within the City, it must comply with the City's regulations relating to cable communications in force at that time.

SECTION 2. It shall be lawful for Grantee to make all needful and necessary excavations in any of said streets, alleys, avenues, thoroughfares, public highways, and public parks.

SECTION 3. The Grantee shall file with the City Engineer or designee maps and materials showing all proposed underground construction work to include the installation of additional facilities or relocation or extension of existing facilities within any street, alley, road or other public way or place within the corporate limits of the City. The City will review the materials submitted and notify the Grantee of any City requirements. For repair work or other work not considered underground construction as stated above, the Grantee shall, if possible, notify the City of the location and general description of the work before beginning work.

All work shall be done in a reasonably safe manner taking into account City standard traffic control procedures and in accordance with requirements of applicable federal laws, state laws, or City ordinances. In emergencies, such filings shall be submitted within thirty (30) days of completion of emergency construction work.

SECTION 4. When any excavation shall be made pursuant to the provisions of this ordinance, the Grantee shall restore the portion of the street, alley, road, or public way or place to the same condition to which it was prior to the excavation. All such work shall be done in strict compliance with the rules, regulations, ordinances or orders which may be adopted from time to time during the continuance of this franchise by the City Council or City Engineer or as may be otherwise provided by law. The City shall have the right to fix a reasonable time within which such repairs and restoration shall be completed. If grantee fails to make such repairs and restoration within the time frame established by the City and after due notice, City shall cause such repairs to be made at the expense of Grantee.

SECTION 5. The Grantee hereby agrees and covenants to indemnify, save harmless and defend the City and its officers, agents and employees from any and all damages, costs and expenses or claims of any kind whatsoever, or nature, arising from any injury to persons or property by reason of the negligent act or omission of the Grantee, its agents or employees in exercising the rights and privileges granted hereunder and by this franchise, except to the extent such damages, costs, and expenses are caused by negligent acts or omissions of the City.

SECTION 6. The Grantee shall provide and keep in force public liability insurance, with a thirty-day cancellation clause, with a combined single limit of one million dollars, relating to a single occurrence, which shall be evidenced by a certificate of insurance filed with the City Recorder. The City shall be named as an additional insured on the policy to the extent of Grantee's indemnity obligations under this franchise agreement. The insurance shall indemnify and save the City harmless against liability or damage which may arise or occur from any claim resulting from the franchisee's operation under this agreement. In addition, the policy shall provide for the defense of the City for any such claims.

In lieu of a third-party public liability insurance policy, Grantee may provide and keep in force self-insurance in an amount at least equal to the limits identified in the preceding paragraph. The Grantee agrees to indemnify, defend and hold harmless the City through its self-insurance program against any and all claims, demands, actions, and suits (including attorney fees and costs) arising out of or resulting from Grantee's activities to the same extent as if an additional insured endorsement had been issued. The Grantee shall provide proof of self-insurance to the City before this agreement shall take effect.

SECTION 7. The City, by its properly constituted authorities, shall have the right to cause the Grantee to move the location of any pole, underground conduit or equipment belonging to Grantee whenever the relocation thereof shall be for public necessity, and the expense thereof shall be paid by the Grantee. Such charges shall comply with state statutes and administrative rules. Whenever it shall be necessary for public necessity to remove any pole, underground conduit or equipment belonging to Grantee or on which any wire or circuit of the Grantee shall be stretched or fastened, the Grantee, shall, upon written notice from the City, or its properly constituted authorities, meet with the City Engineer and agree in writing to a plan and date certain to remove such poles, underground conduit, equipment, wire or circuit, at Grantee's expense, and if the Grantee fails, neglects or refuses to do so,

the City, by its properly constituted authorities, may remove the same at the expense of the Grantee. The costs associated with the removal, relocation or extension of Grantee's facilities at the request of a private developer or development shall be borne by such private developer or development.

SECTION 8. At such time that Grantee intends to discontinue using or to remove (including actions pursuant to a City termination order) any telecommunications network facility or facilities within the City, Grantee shall submit a specific plan for such discontinuance or removal to the City Engineer and shall gain the City Engineer's approval. The City Engineer may allow Grantee to abandon in place any facility or facilities, may require the Grantee to remove or modify the facility or facilities within the public rights-of-way or other public place or property, may cause the facility or facilities to be removed at the Grantee's expense, or may take any combination of these actions. Grantee shall complete such removal or modifications in accordance with a schedule set by the City Engineer. Until such time that Grantee's property is completely removed and all restorations to the public rights-of-way or other public places or property have been completed, Grantee shall be responsible for all necessary repairs, relocations, and maintenance of the facility or facilities in the same manner and degree as if the facility or facilities were in active use, and the Grantee shall retain all liability for such facility or facilities.

SECTION 9. Grantee shall maintain a clause in its standard Facilities Agreement to be signed by all lessees of Grantee's conduit or fiber optic lines authorizing the Grantee to disclose the lessee's business name and address to the City. Upon entering into a lease agreement with a new lessee, Grantee shall provide a one-time notice of the lessee's business name and address to the City.

SECTION 10. All notices and approvals required under this Agreement shall be in writing. The Grantee shall provide the City with the name, position and phone number of Grantee staff that can be contacted for administration of this Agreement and for contact with construction-related questions and comments.

Such notices and approval shall be directed to the City as follows:

City Engineer, City of Tigard

13125 SW Hall Blvd., Tigard, Oregon 97223

(503) 639-4171

SECTION 11. Upon request of the City, the Grantee shall provide available plans and locate any underground conduit or equipment belonging to Grantee, as required for the preparation of construction drawings.

SECTION 12. Whenever it becomes necessary to temporarily rearrange, remove, lower or raise the wires, cables or other plant of Grantee for the passage of buildings, machinery

or other objects, Grantee shall temporarily rearrange, remove, lower or raise, its wires, cables or other plant as the necessities of the case require; provided, however, that the person or persons desiring to move any such buildings, machinery or other objects, shall pay the entire actual cost to Grantee of changing, altering, moving, removing or replacing its wires, cables or other plant so as to permit such passage, and shall deposit in advance with Grantee a sum equal to such cost as estimated by Grantee and shall pay all damages and claims of any kind whatsoever, direct or consequential, caused directly or indirectly by changing, altering, moving, removing or replacing of said wires, cables or other plant, except as may be occasioned through the sole negligence of Grantee. Grantee shall be given not less than ninety-six (96) hours written notice by the party desiring to move such building or other objects. Said notice shall detail the route of movement of such building or other objects over and along the streets, alleys, avenues, thoroughfares and public highways and shall bear the approval of the City. Such moving shall be with as much haste as possible and shall not be unnecessarily delayed or cause Grantee unnecessary expense or waste of time.

SECTION 13. In consideration of the rights and privileges hereby granted, Grantee agrees to pay to the City the greater of \$7,500 per year or five percent (5%) of the gross revenues derived from exchange access services, as defined in ORS 401.710, and lease revenues to the extent that lease revenues are separate from and in addition to revenues derived from exchange access services within the city limits less net uncollectibles. Such payments shall be made to the City every six months for the life of this agreement on or before March 15 for the six month period ended December 31, and September 15 for the six month period ended June 30.

Such franchise payment will be accepted by the City from the Grantee also in payment of any license, privilege or occupation tax or fee charged for regulatory or revenue purposes. The franchise payment is not accepted in satisfaction of payments due to City for the failure of Grantee to perform any of Grantee's obligations pursuant to this franchise agreement including but not limited to Grantees' obligations to bear the cost of repairs under Section 4 and the cost of relocation under Section 6.

The City shall have the right to change the percentage of gross revenues set forth above at any time during the life of this agreement to any amount permitted by law provided it has made such notice in writing at least 180 days prior to the effective date of any change.

The City shall have the right to conduct, or cause to be conducted, an audit of franchise payments as defined herein. Such audits may be conducted at two year intervals beginning two years after the effective date of this agreement. The City shall conduct the audit at its own expense. Any difference of payment due either the City or Grantee through error or otherwise as agreed upon by both the City and Grantee, shall be payable within sixty (60) days after discovery of such error.

SECTION 14. The rights, privileges and franchise hereby granted shall continue to be in full force for a period of ten (10) years from the date this ordinance becomes effective. It is understood and agreed that either party may terminate or renegotiate the terms of

this agreement after 60 days notice in writing. This ordinance shall be subject to any and all State or Federal laws and regulations.

SECTION 15. The Grantee shall, within thirty (30) days of the effective date of this ordinance, file with the Recorder of the City its written acceptance of all the terms and conditions of the ordinance and if not so accepted by the Grantee, this ordinance shall be void.

DATED this _____ day of _____, 2004.

CITY OF TIGARD
OREGON, a Municipal Corporation

By:


Mayor Craig Dirksen

ATTEST:

Jane McGarvin
Deputy City Recorder

ONFIBER COMMUNICATIONS INC.

By: _____

Its: _____